

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

10	LOAY S. NASER,	)	Case No.: 5:10-CV-04475 EJD
11	Plaintiff,	)	<b>ORDER GRANTING-IN-PART AND</b>
12	v.	)	<b>DENYING-IN-PART DEFENDANTS'</b>
13	METROPOLITAN LIFE INSURANCE	)	<b>MOTION FOR SUMMARY</b>
14	COMPANY, METLIFE ENTERPRISE	)	<b>JUDGMENT; DENYING</b>
15	GENERAL INSURANCE AGENCY, INC.,	)	<b>PLAINTIFF'S MOTION FOR</b>
16	AND METLIFE SECURITIES,	)	<b>SUMMARY JUDGMENT;</b>
17	Defendants.	)	<b>GRANTING DEFENDANTS'</b>
18		)	<b>MOTION TO STRIKE</b>
19		)	<b>[Re: Docket Nos. 71, 89, 94]</b>

The above-captioned lawsuit is an employment-related action brought by Plaintiff Loay Naser (“Naser” or “Plaintiff”) against Defendants Metropolitan Life Insurance Company, MetLife Enterprise General Insurance Agency, Inc., and MetLife Securities, Inc. (collectively “MetLife” or “Defendant”). Presently before the Court are three motions. MetLife has moved for summary judgment as to all eight causes of action brought forth by Naser. See Docket Item No. 89. MetLife has also moved to strike evidence submitted by Naser. See Docket Item No. 71. Naser has moved for partial summary judgment as to one of his claims for unpaid wages. See Docket Item No. 90.

The Court found this matter suitable for decision without oral argument pursuant to Civil Local Rule 7-1(b) and previously vacated the hearing. Having fully reviewed the parties’ briefings, and for the following reasons, the Court GRANTS MetLife’s Motion to Strike, DENIES Naser’s

1 Motion for Partial Summary Judgment, and GRANTS-IN-PART and DENIES-IN-PART  
2 MetLife's Motion for Summary Judgment.

3

## 4 I. Background

### 5 A. Factual Background

#### 6 1. MetLife Insurance Company and Its Incentive Programs

7 MetLife is a Delaware corporation with its principal place of business in New York. Def.'s  
8 Answer to Pl.'s Second Amended Consolidated Complaint ("SACC"), ¶ 5. MetLife deals in  
9 insurance and annuities and offers these services through agencies distributed throughout the  
10 country. Def.'s Ex. 1, Declaration of Kim Wargaki ("Wargaki Decl.") ¶ 3, Docket Item No. 78.  
11 MetLife operates one such agency in San Jose, CA ("E-38"), with satellite offices in Cupertino, CA  
12 and Walnut Creek, CA. Def.'s Ex. 25, Deposition of Loay S. Naser, Nov. 16, 2012 ("Naser Dep.  
13 11/16") at 162:23–163:2, Docket Item No. 76. Each agency offers its services through Financial  
14 Services Representatives ("FSRs"), who earn commission on the sale of insurance and other  
15 financial products. Wargaki Decl. ¶ 19. FSRs work under the direction of a local management team  
16 headed by a Managing Director. Id. ¶ 3. The management team earns its pay from Performance  
17 Based Credits ("PBC")—effectively a type of override on the premiums clients pay. Id. ¶¶ 7, 9.

18 PBC serves both as the source of management pay and as an investment fund from which  
19 local management may pay out expenses intended to generate revenue. Id. ¶ 8. PBC does not,  
20 however, act as a payment source for the agency's necessary and direct expenses, such as rent,  
21 utilities, and insurance, which are paid by MetLife through an independent operating budget. Id. ¶  
22 11. As compensation, management may take a percentage draw from PBC. Id. ¶¶ 12–15. MetLife  
23 considers a percentage draw over 50% inappropriate and reflective of insufficient investment in the  
24 agency. Id. ¶ 23. MetLife recalibrates PBC at regular intervals based on projected growth and a  
25 location's percentage achievement of its goal. Id. ¶ 16. MetLife pays its draws based on 85% of  
26 projected PBC, leading to an under- or overstatement of payments. Id. ¶ 21. There is therefore a

necessary delay between the payment of draws and the final assessment of actual PBC. In order to rationalize the difference between the 85% payout of PBC and the actual draw due, MetLife undertakes an annual process called a “true-up.” Id. ¶ 18. During a “true-up,” amounts due from understated payments are paid out, and any overpayment must be paid back to MetLife. Id.

MetLife awards additional PBC through incentive programs. Id. ¶ 9. One of these is the “super starter” program, which rewards new FSRs for strong performance. Id. ¶ 20. It also motivates management to push the performance of new FSRs by awarding PBC to agency locations for each FSR who achieves super starter status. Def.’s Ex. 1, 2007 Management Compensation Plan Description (“Comp. Plan”) at 9, Docket Item No. 78; Def.’s Ex. 5, Deposition of Thomas Ross, May 15, 2012 (“Ross Dep. 5/15”) at 50:16–22, Docket Item No. 73; Def.’s Ex. 6, Deposition of Thomas Ross, May 17, 2012 (“Ross Dep. 5/17”) at 207:22–208:9, Docket Item No. 74; Def.’s Ex. 7, Deposition of Michael Vietri, July 26, 2012 (“Vietri Dep. 7/26”) at 34:19–25:25, Docket Item No. 75.

In addition to the super starter program, MetLife supports new FSRs by assigning existing client accounts to them. Def.’s Ex. 2, Declaration of Michael Vietri (“Vietri Decl.”) ¶ 7; Naser Dep. 11/16 at 12:11–18. These are clients whose accounts are “orphaned”—that is, no longer assigned to another FSR because of that FSR’s separation from MetLife. *Id.* Managing Directors typically assign these client accounts evenly across all FSRs in a location, including new FSRs. Vietri Decl. ¶ 8; Naser Dep. 11/16 at 12:11–18.

## **2. Loay Naser's Employment with MetLife**

Loay Naser is a Kuwaiti-born resident of California. SACC ¶¶ 6, 7; Declaration of Loay Naser in Opp’n to Defs.’ Mot. for Summ. J. (“Naser Decl. Opp’n”) ¶ 2. He describes himself as a Christian of Palestinian/Arab ancestry. Id. ¶ 11. In 1991, he joined MetLife at its Cupertino office as an FSR. Def.’s Ex. 20, Deposition of Loay S. Naser, September 28, 2012 (“Naser Dep. 9/28”) at 48:10–11, Docket Item No. 74. At the time of his hire, Naser signed a memorandum

1 acknowledging that his employment was “at-will.” Naser Dep. 9/28 at 20–21, 25; see also Def.’s  
2 Ex. 23, MetLife Disciplinary Action Policy, Docket Item No. 76; Def.’s Ex. 22, Guide to Policies  
3 and Procedures at 4, Docket Item No. 76. In 2000, MetLife promoted him and Mike Shami to co-  
4 Managing Directors of E-38. Def.’s Ex. 4, Deposition of Loay S. Naser, May 11, 2012 (“Naser  
5 Dep. 5/11”) at 17:18–22, 63:12–64:10, 166:13–18. In 2007, pursuant to MetLife’s perception that  
6 Shami was doing too little work to justify allowing him to retain the title of co-Managing Director,  
7 the pair was given a set of options: (1) allow Naser to take over as Managing Director, with Shami  
8 accepting a demotion to FSR, or (2) separate from MetLife. Id. Naser and Shami chose the first  
9 option. Id. Accordingly, MetLife promoted Naser to sole Managing Director of the agency in San  
10 Jose (“E-38”). Id.

11

12                   **3. MetLife’s Special Investigations Unit Investigates Naser’s Management of**  
**E-38**

13                   The series of events underlying the present action commenced in the autumn of 2008. That  
14 September, Naser flew to Jordan to attend his father’s funeral. SACC ¶ 13. He states that upon his  
15 return, he was subjected to derogatory comments about Jordan and his travels there. SACC ¶ 13.  
16 Around the same time, Peter Chang, a subordinate FSR in Naser’s agency complained to MetLife’s  
17 Human Resources department (“HR”) alleging that Naser forced FSRs to split 25% of their  
18 commissions resulting from certain leads with management (“the Chang complaint”). Def.’s Ex. 9,  
19 Internal Investigation Report (“Ross Report”) at 3, Docket Item No. 75. HR referred the matter to  
20 MetLife’s Special Investigations Unit (“SIU”). Ross Dep. 5/15 at 15:23–16:19; Def.’s Ex. 3,  
21 Declaration of Thomas Ross (“Ross Decl.”) Ex. 1, Docket Item No. 73.

22                   In October, 2008, the SIU began its investigation of the Chang complaint. Id. Thomas Ross,  
23 then Senior Fraud Investigator, led this investigation (the “Ross investigation”). Id. The Ross  
24 investigation lasted through June of 2009, and Ross noted that he had never known an SIU  
25 investigation that had lasted so long. Ross Report, Docket Item No. 75. Upon the conclusion of the  
26 Ross investigation, Ross issued a final report (the “Ross Report”) to the committee overseeing the

1 investigation. Id. This committee consisted of several members included on a high-level  
2 communications distribution list, including Michael Vietri, Executive Vice-President for Individual  
3 Distribution, and Nam Patel from MetLife Human Resources, among others. See Docket Item No.  
4 75, Ex. 9 (distribution list). The Ross Report not only confirmed the accuracy of the Chang  
5 complaint, but revealed many additional violations of MetLife procedures, practices, and policies.  
6 Ross Report, Docket Item No. 75. These included (1) that Naser required FSRs to leave  
7 commission assignment lines on new applications blank so that he could assign 25% of  
8 commissions to management; (2) that Naser had exchanged the assignment of 30,000 orphaned  
9 accounts with an FSR in southern California in return for that FSR's payment of a \$70,000 salary  
10 for Naser's secretary; (3) that Naser would require experienced FSRs to assign accounts to new  
11 FSRs in order to help new FSRs achieve super starter status, and that this arrangement required the  
12 new FSRs to repay these commissions to the experienced FSRs in either cash or commission  
13 assignments; (4) that Naser would switch paperwork in order to ensure that new applicants would  
14 pass competency exams; and (5) that Naser had hired a marketing director for the agency, and, as  
15 part of the deal, agreed to personally pay her housing costs—an arrangement never reported to HR  
16 and for which no IRS forms 1099 were ever issued. See Ross Report, Docket Item No. 75. MetLife  
17 management considered this conduct improper, especially because it artificially increased PBC at  
18 E-38. Id.

19 John Schrieffer and Steve Day, Naser's direct managers, received the Ross Report and,  
20 upon review recommended that Naser and his management team be placed under enhanced  
21 supervision and that Naser and his management team receive no discretionary bonus for 2009; no  
22 recommendation of termination was included. Def.'s Ex. 17, Deposition of John Schrieffer,  
23 September 20, 2012 ("Schrieffer Dep. 9/20") at 252:9–253:15, Docket Item No. 105. Vietri, the  
24 MetLife executive responsible for disciplinary action in this matter, accepted these  
25 recommendations. Def.'s Ex. 12, Deposition of Michael Vietri, July 27, 2012 ("Vietri Dep. 7/27")

1 at 102:7–5, 103, Docket Item No. 77; Def.’s Ex. 13, Docket Item No. 74. Over the following two  
2 months, MetLife’s HR and Compliance departments developed an enhanced supervision plan. Id.

3 During the Ross investigation, Naser called HR in June of 2009 to complain about  
4 discrimination he believed he had suffered on the basis of his national origin, race, and/or  
5 perceived religion. Naser Decl. Opp’n ¶¶ 13–17. He cited the length of the investigation as an  
6 additional example of this discrimination. Id. The HR representative who fielded the complaint,  
7 Patel, did not report this complaint to Vietri. Vietri Decl. ¶¶ 3–4. During a joint conference call  
8 among Naser, Patel, and Tony DeCarlo (Ross’ supervisor) to discuss these allegations of  
9 discrimination, DeCarlo urged Naser to be patient. Naser Decl. Opp’n ¶¶ 13–17.

10

11 **4. Naser’s Additional Concerns Expressed to Management**

12 While the Ross investigation was ongoing, Naser raised two further issues with MetLife  
13 senior management relevant to this case. Naser Decl. Opp’n ¶ 18. The first matter involved a  
14 retirement program, called RetireWise, that MetLife offices were responsible for offering to  
15 clients. Id. Naser raised concerns to Vietri about whether the program would have potentially  
16 caused Naser’s FSRs to breach their fiduciary duty to clients. Id. Vietri dispatched MetLife lawyer  
17 Gary Simpson to discuss the matter with Naser. Id. No further action was taken on this matter by  
18 any party. Id.

19 In addition, during the spring of 2009, Naser complained to his superior, Schrieffer, that  
20 Naser had not been timely paid his “true-up” relative to 2008. Id. ¶ 19. There had been several  
21 previous communications back and forth between the two as to what percentage was due payable  
22 to Naser as opposed to other managers at E-38. Schrieffer Dep. 9/20 at 62:17–64:8, 68:8–69:15,  
23 71:11–1. Schrieffer immediately released this payment after the conversation with Naser. Naser  
24 Dep. 11/16 at 83:9–84:4.

1                   **5. Additional Complaints against Naser; MetLife's Decision to Terminate**

2                 In July 2009 another FSR reporting to Naser, Mary Hanson, complained to HR that Naser  
3 had discriminated against her on the basis of age and gender. Def.'s Ex. 15, Deposition of Susan  
4 LeClerc, September 18, 2012 ("LeClerc Dep. 9/18") at 12, Docket Item No. 105. HR informed  
5 Naser that it would be dispatching Susan LeClerc to investigate the matter (the "LeClerc  
6 investigation"). Id. Naser asserts that when he called Patel at HR to file another complaint about  
7 continuing discrimination, Patel privately told him she (Patel) felt he was not being treated fairly.  
8 Naser Decl. Opp'n ¶ 16.

9                 The LeClerc investigation lasted approximately one month; she interviewed twenty  
10 individuals during the investigation. Def.'s Ex. 10, Vietri Dep. 7/26 Ex. E at MET 009624-6925,  
11 Docket Item No. 75. LeClerc interviewed Naser roughly halfway through the cadre of interviews.  
12 During the course of the LeClerc investigation, LeClerc heard from Amy Anderson, another E-38  
13 employee, who alleged that Naser had other employees take Naser's continuing education exams.  
14 Def.'s Ex. 10, Vietri Dep. 7/26 Ex. E at MET 009624-6925. LeClerc, in accordance with normal  
15 MetLife practice, referred this matter to SIU for further investigation. Def.'s Ex. 11, Vietri Dep.  
16 7/26 Ex. G, Docket Item No. 75; Def.'s Ex. 7, Vietri Dep. 7/26 at 58; Def.'s Ex. 15, LeClerc Dep.  
17 9/18 at 46:16–22, 150:15–18. SIU assigned Rob Hill to conduct this investigation (the "Hill  
18 investigation"). Def.'s Ex. 8, Vietri Dep. Ex. C, Docket Item No. 75; Vietri Dep. 7/26 at 15.

19                 In August, Naser was informed that his agency's budget would be reduced to reflect the  
20 cancellation of any discretionary bonus to be awarded to E-38 management for 2009. Schrieffer  
21 Dep. 9/20 at 252:9–253:15. During the same time period, the LeClerc and Hill investigations  
22 concluded and their respective investigators completed relevant reports (the "LeClerc report" and  
23 the "Hill report"). Def.'s Ex. 10, Vietri Dep. Ex. E at MET 009624-6925; Vietri Dep. 7/26 at 22:18  
24 – 23:19. The LeClerc report articulated the LeClerc investigation's procedures and findings at  
25 length and ultimately concluded that Naser had not discriminated against Mary Hanson. Def.'s Ex.  
26 16, LeClerc Dep. The Hill report, however, concluded that another employee named Robin

1 Archuleta had Naser's account password, that there was no legitimate reason for her to have his  
2 password, and that she was likely taking Naser's exams. Vietri Dep. 7/26 at 15.

3 In September, Vietri received the updated LeClerc and Hill reports. Vietri Dep. 7/26 22:18  
4 – 23:19. Based on their findings, and in the wake of the lengthy Ross investigation, Vietri made the  
5 decision to terminate Naser's employment with MetLife. Id. Because Naser was on vacation during  
6 the week of September 7, 2009, MetLife waited until September 14 for the termination. Def.'s Ex.  
7 18, Docket Item No. 74 (letter from Schrieffer to Naser confirming Naser's termination); Naser  
8 Dep. 9/28 at 53:3–9.

9

10 **B. Procedural History**

11 On October 4, 2010, Naser filed the present action after exhausting administrative remedies  
12 and obtaining a Notice of Right to Sue from the United States Equal Employment Opportunity  
13 Commission. See Compl. Docket Item No. 1. The Complaint was amended twice to its present  
14 form; the Second Amended Consolidated Complaint ("SACC") contains the following eight causes  
15 of action: (1) discrimination on the basis of race or national origin and/or perceived religion in  
16 violation of Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§2000e, et seq., and the Fair  
17 Employment and Housing Act ("FEHA"), Cal. Gov. Code § 12940; (2) harassment on the basis of  
18 race or national origin and/or perceived religion in violation of Title VII and FEHA through the  
19 creation of a hostile work environment; (3) unlawful retaliation; (4) wrongful termination in  
20 violation of California public policy; (5) violation of sections 201 et seq. of the California Labor  
21 Code for failure to pay wages upon termination; (6) violation of section 2802 of the California  
22 Labor Code for failure to reimburse business expenses; (7) wrongful termination; and (8) unfair  
23 competition under section 17200 of the California Business and Professions Code. See SACC ¶¶  
24 22–58.

25 On November 28, 2012, the parties filed cross motions for summary judgment. MetLife  
26 filed its Motion for Summary Judgment on each of Naser's causes of action. See Def.'s Mot. for

1 Summ. J., Docket Item No. 89. Naser filed his Motion for Partial Summary Judgment on his fifth  
2 cause of action (failure to pay wages upon termination) only. See Pl.'s Mot. for Partial Summ. J.,  
3 Docket Item No. 94. Additionally, MetLife filed a Motion to Strike pursuant to Federal Rule of  
4 Civil Procedure 37. See Docket Item No. 71.

5

## 6 II. Motion to Strike

7 Naser has submitted various credit card charge records as evidence in support of his Motion  
8 for Partial Summary Judgment and in opposition to MetLife's Motion for Summary Judgment  
9 regarding his sixth claim which is for MetLife's alleged failure to reimburse business expenses in  
10 violation of section 2802 of the California Labor Code. See Docket Item No. 71, Ex. 2 (listing  
11 credit card charges). Naser submitted this evidence on November 9, 2012, ten days after the close  
12 of discovery and only fourteen days before the summary judgment briefing deadline. See Pretrial  
13 Order, Docket Item No. 61; Def.'s Mot. to Strike at 1, Docket Item No. 71. These credit card  
14 charge records consist of 467 charges to Naser's personal American Express card displaying only  
15 sum totals for each purchase with a variety of merchants in a wide range of locations. Id. None are  
16 linked to individual receipts placed in evidence evincing the precise nature of the goods or services  
17 purchased. Id. Ex. 2.

18 Federal Rule of Civil Procedure 26 provides that a party which has answered  
19 interrogatories, requests for production, or requests for admission during discovery must timely  
20 supplement those answers if the party "learns that in some material respect the disclosure or  
21 response is incomplete or incorrect, and if the additional or corrective information has not  
22 otherwise been made known to the other parties during the discovery process or in writing." Fed.  
23 R. Civ. P. 26(e)(1)(A). A party may answer an interrogatory, request for production, or request for  
24 admission by specifying the records from which the answers may be obtained and then providing  
25 these records. Fed. R. Civ. P. 33(d). The party making the interrogatory "must be given a

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1 reasonable opportunity to examine and audit the records and to make copies, compilations,  
2 abstracts, or summaries.” Fed. R. Civ. P. 33(d)(2).

3 Rule 37(c) permits the exclusion of evidence improperly withheld under Rule 26 unless the  
4 failure to disclose was substantially justified or harmless. Fed. R. Civ. P. 37(c) (a party failing to  
5 provide information required under Rule 26(a) or 26(e) “is not allowed to use that information or  
6 witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was  
7 substantially justified or is harmless”); see also Pfingston v. Ronan Eng’g Co., 284 F.3d 999, 1005  
8 (9th Cir. 2002) (noting that if a party had been able to show prejudice and/or unfair surprise as a  
9 result of his opponent’s failure to disclose information pursuant to Rule 26(e)(1), the district court  
10 could have properly barred its use at summary judgment). The burden of showing harmlessness  
11 rests with the non-moving party. Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101,  
12 1106–07 (9th Cir. 2001). A showing of prejudice to the moving party will demonstrate that the  
13 opposing party’s failure to disclose was not harmless or justified. Cambridge Elecs. Corp. v. MGA  
14 Elecs., Inc., 227 F.R.D. 313, 324 (C.D. Cal. 2004). Courts have broad discretion in granting  
15 motions to strike evidence under Rule 37(c)(1). Yeti by Molly, 259 F.3d at 1106.

16 As an initial matter, the Court finds that Naser was under such an obligation to produce  
17 pursuant to Rule 26(e). Namely, Naser’s original complaint, dated October 4, 2010, contained an  
18 allegation that Naser had not been “reimbursed for all of his MetLife related expenses . . .” Compl.  
19 ¶ 23. In response, MetLife served a Rule 34 interrogatory on Naser, seeking “DOCUMENTS  
20 supporting or relating to the allegation that: ‘. . . [Naser] . . . was not reimbursed for all of his Met  
21 Life related expenses . . .’” See Def.’s Mot. to Strike, Ex. 3 (denominated “Defendants’ First Set of  
22 Information and Document Requests to Plaintiff”), Docket Item No. 71. Naser responded with the  
23 claim that the information pertaining to this allegation was attorney-client privileged or otherwise  
24 available to MetLife through its own records. See Def.’s Mot. to Strike, Ex. 4 (denominated  
25 “Plaintiff’s Objections and Responses to Defendants’ First Set of Information and Document  
26 Requests to Plaintiff”), Docket Item No. 71. At no time did Naser supplement his answers.

1 However, when Naser added his claim for unreimbursed business expenses under section 2802 of  
2 the California Labor Code on December 12, 2011, he had a duty to amend his discovery responses  
3 with any material information that would make relevant disclosures complete or correct. See Fed.  
4 R. Civ. P. 26(e). MetLife had no knowledge in its own records about many of the submitted  
5 charges (such as personal vacation receipts, and season tickets to local sports venues (see Def.'s  
6 Mot. to Strike at 5)) because none of these charges had previously been communicated to MetLife.  
7 See Def.'s Mot. to Strike at 2 (noting that MetLife had scrutinized Naser's employee file and found  
8 no receipts for expenses and no denials of requests for reimbursement). As such, Naser's attempt to  
9 introduce these apparently new records in November 2012 occurred almost one year after Naser  
10 had an obligation to disclose them and after the close of discovery.

11 As noted, when a party fails to timely meet the obligation under Rule 26(e), Rule 37(c)'s  
12 sanctions preclude that party from introducing this evidence, unless the failure to disclose was  
13 substantially justified or harmless. Fed R. Civ. P. 37(c); Yeti by Molly, 259 F.3d at 1106;  
14 Cambridge Elecs., 227 F.R.D. at 321–24. In order to forestall Rule 37(c) sanctions striking these  
15 credit card receipts as evidence, Naser first argues that MetLife has not been harmed by the  
16 lateness of his disclosure. The Court disagrees. Prejudice and surprise, the ability of the harmed  
17 party to cure the prejudice, the likelihood of disruption at trial, and willfulness in not timely  
18 disclosing evidence are all factors the Court may consider in determining "harmlessness." See  
19 Voltera Semiconductor Corp. v. Primarion, Inc., No. C-08-05129, 2012 WL 5932733, \*2 (N.D.  
20 Cal. Nov. 27, 2012) (listing factors). While, MetLife was able to question Naser about the credit  
21 card records at his additional November 16, 2012 deposition, this deposition was originally  
22 scheduled to address many other issues, not solely the question of allegedly unreimbursed business  
23 expenses. See Discovery Order, Docket Item No. 63. Given the relatively undetailed information in  
24 the credit card charge report, MetLife has not had a meaningful opportunity to depose Naser on the  
25 topic. Moreover, MetLife had only dedicated part of one sentence to this topic in its argument for  
26 additional deposition time with Naser. See Discovery Letter Brief, Docket Item No. 62. Instead,

1 MetLife was forced to alter its deposition strategy at the last minute to accommodate the tardy  
2 production of Naser's credit card records.

3 In the alternative, Naser argues that his delay was substantially justified. Naser contends  
4 that because MetLife had also produced information late, Naser was permitted to do the same.  
5 Naser cites to no authority in support of the proposition that an opponent's dilatory conduct  
6 justifies delaying the production of documents Naser himself had an obligation to make available.  
7 Cf. Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1028 (9th Cir. 2003) (noting that a "rash of  
8 discovery" shortly before the cut-off date did not justify earlier failure to disclose). Moreover,  
9 Naser's own testimony demonstrates that Naser was easily able to produce these credit card  
10 records—all it required was calling American Express and having them "walk [him] through it" so  
11 that he could "go online and [] order[] them." See Naser Dep. 11/16 at 119.

12 Accordingly, because the Court finds that Naser's delay in producing the credit card records  
13 at issue here was neither harmless nor substantially justified, the Court GRANTS Defendant  
14 MetLife's Motion to Strike Evidence Improperly Withheld.

### 16 III. Motions for Summary Judgment

#### 17 A. Legal Standard

18 A court shall grant a motion for summary judgment if "there is no genuine dispute as to any  
19 material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A  
20 material fact is one that would affect the outcome of the proceedings. Anderson v. Liberty Lobby,  
21 Inc., 447 U.S. 242, 248 (1986). The moving party bears the initial burden of demonstrating the  
22 absence of a triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

23 If the moving party meets this initial burden, the non-moving party must then go beyond the  
24 pleadings to designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P.  
25 56(e); Celotex, 477 U.S. at 324; see also Liberty Lobby, 447 U.S. at 249–50 (noting that the non-  
26 moving party bears the burden of producing more than "a scintilla of evidence" of a triable issue of

1 material fact in its favor). The court must regard as true the non-moving party's evidence, if  
2 supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324. Such evidentiary  
3 material must consist of admissible evidence. Fed. R. Civ. P. 56(c); see also Hal Roach Studios,  
4 Inc. v. Feiner & Co., 896 F.2d 1542, 1550 (9th Cir. 1990). Merely suggesting that facts are in  
5 controversy, or highlighting conclusory or speculative testimony, is insufficient to defeat summary  
6 judgment. See Thornhill Publ'g Co. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979).

7 Rather, a genuine issue for trial exists when the non-moving party presents evidence from  
8 which a reasonable jury, viewing the evidence in the light most favorable to that party, could  
9 resolve the material issue in his or her favor. Liberty Lobby, 477 U.S. at 248–49; Barlow v.  
10 Ground, 943 F.2d 1132, 1134–36 (9th Cir. 1991). By contrast, a court must grant summary  
11 judgment when a party “fails to make a showing sufficient to establish the existence of an element  
12 essential to that party’s case, on which that party will bear the burden of proof at trial.” Celotex,  
13 477 U.S. at 322.

14

15 **B. Claims Stipulated Dropped (Claims 1 and 2)**

16 During Naser’s November 16, 2012 deposition, he stipulated that he would no longer  
17 pursue his first and second causes of action, alleging violations of FEHA and Title VII stemming  
18 from allegations of MetLife’s creation of a hostile work environment, harassment, and  
19 discrimination on the basis of race and/or national origin and perceived religion. Naser Dep. 11/16  
20 at 5:16–6:7; see also Def.’s Mot. for Summ. J. at 12. As such, the Court GRANTS MetLife’s  
21 Motion for Summary Judgment with regard to claims 1 and 2 of the SACC.

22

23 **C. Unlawful Retaliation and Wrongful Termination Claims (Claims 3 and 4)**

24 Naser alleges two analytically related causes of action: unlawful retaliation in violation of  
25 FEHA and/or Title VII (claim 3), and wrongful termination in violation of California public policy  
26 (claim 4). To establish a prima facie case of unlawful retaliation or wrongful termination, a

1 plaintiff must show “(1) involvement in a protected activity, (2) an adverse employment action, and  
2 (3) a causal link between the two.” Brooks v. City of San Mateo, 229 F.3d 917, 928 (9th Cir.  
3 2000). If a plaintiff meets this burden, the defendant must put forth a legitimate, non-  
4 discriminatory reason for the adverse employment action; if that is accomplished, the plaintiff must  
5 then show that the stated reason is pretext. Id.; see also Crown v. Wal-Mart Stores, Inc., 8 F. App’x  
6 776, 778 (9th Cir. 2001) (holding that a plaintiff to a retaliation complaint has the burden of  
7 proving—in addition to the engagement in protected activity and the causal link between that  
8 activity and the retaliatory conduct—that the employer’s explanation for the action was a pretext  
9 for the illegal consequence).

10 As an initial matter, the Court notes that Naser has met the first two prongs of the prima  
11 facie case. First, Naser’s complaints to management about his concerns regarding the legality of the  
12 RetireWise program and to HR about discrimination on the basis of race and/or national origin and  
13 perceived religion qualify as protected activity in the context of a wrongful or retaliatory  
14 termination suit. See 42 U.S.C. §§ 2000e-2(a)–2000e-3(a) (2012) (describing activity protected  
15 against adverse employment action under Title VII); Cal. Gov. Code § 12940(a) (West 2012)  
16 (describing activity protected against adverse employment action under FEHA); see also Reeves v.  
17 Safeway Stores, Inc., 121 Cal. App. 4th 96 (2004); Walker v. Grand Energy Servs., LLC, 726  
18 F. Supp. 2d 1091, 1102 (E.D. Cal. 2010). MetLife subjected him to an adverse employment action  
19 in the form of his involuntary termination. See 42 U.S.C. §§ 2000e-2(a)–2000e-3(a) (describing  
20 adverse employment actions in Title VII complaints); Cal. Gov. Code § 12940(a) (listing  
21 prohibited adverse employment actions under FEHA); Nidds v. Schindler Elevator Corp., 113 F.3d  
22 912, 917 (9th Cir. 1996) (disposing of a FEHA claim); Rose v. Wells Fargo & Co., 902 F.2d 1417,  
23 1421 (9th Cir. 1990); Guz v. Bechtel Nat’l, Inc., 24 Cal. 4th 317, 355 (2000).

24 Naser, however, has not sufficiently demonstrated the third prong in that he has failed to  
25 show a causal link between the protected activity and his termination. Naser has not produced  
26 sufficient evidence that (1) the link exists and (2) that MetLife’s stated reason for termination was  
27

1 pretextual. See Brooks, 229 F.3d at 928 (holding that a defendant may defeat a plaintiff's prima  
2 facie case by putting forth a legitimate, non-discriminatory reason for the adverse employment  
3 action); see also Crown v. Wal-Mart Stores, Inc., 8 F. App'x 776, 778 (9th Cir. 2001) (holding that  
4 the plaintiff in a retaliation suit bears the burden of proving that the employer's proffered  
5 explanation for the adverse employment action was a pretext).

6 MetLife explains that it terminated Naser after a series of investigations into Naser's  
7 breaches of MetLife business practices. During deposition, Vietri asserted that he based his  
8 decision to terminate Naser on the totality of the circumstances, and that MetLife considered  
9 Naser's actions improper and in breach of the company's policies. Docket Item No. 75, Vietri Dep.  
10 7/26 at 11:8–9, 22:18–23:19, 76:22–78:8. He did not base the decision solely on the Ross Report.  
11 Id. Instead, the results of the Ross Report, coupled with Vietri's understanding of the LeClerc  
12 investigation and the Hill investigation, led Vietri to decide to terminate Naser. Id. Poor  
13 performance and violation of company policies or procedures, such as those that prompted Vietri's  
14 decision, are typical, non-discriminatory reasons justifying adverse employment action. Villiarimo  
15 v. Aloha Island Air, Inc., 281 F.3d 1054, 1062–64 (9th Cir. 2002) (finding that violation of  
16 company policies and procedures is a non-discriminatory reason for termination).

17 Moreover, MetLife contends that Vietri had no knowledge of Naser's complaints to HR  
18 involving discrimination on the basis of his race and/or national origin and perceived religion;  
19 Naser has failed to demonstrate otherwise. In support of its contention, MetLife points to Vietri's  
20 testimony. By declaration, Vietri asserts that Patel had never informed him of any of Naser's  
21 complaints to HR. Vietri Decl. ¶ 3. Without this knowledge, Naser cannot establish the necessary  
22 causation of his prima facie case. Morgan v. Regents of the Univ. of Cal., 88 Cal. App. 4th 52  
23 (2000) ("Essential to a causal link is evidence that the employer was aware that the plaintiff had  
24 engaged in the protected activity.") In the absence of evidence of any conversations, corroborating  
25 testimony, or other affirmative evidence to establish the causal link between Naser's complaints  
26 and his termination, his claim fails not only to show pretext, but also to show the causation

1 necessary to his prima facie case. Cf. Walker, 726 F. Supp. 2d at 1102 (denying defendant  
 2 summary judgment where plaintiff could point to supervisor's angry reaction to complaints and co-  
 3 worker's testimony corroborating the alleged causal link); Reeves, 121 Cal. App. 4th 96 (accepting  
 4 as evidence of a triable issue of material fact affirmative evidence presented by plaintiff that tended  
 5 to call into question the cause-in-fact of plaintiff's termination).

6 In attempting to establish his prima facie case and oppose Defendant's Motion, Naser offers  
 7 several arguments, each of which will be addressed in turn. First, in support of his pretext  
 8 argument, Naser points to the shortness in time between his complaints and his termination.  
 9 Indeed, only a few months elapsed between Naser's complaint to HR of discrimination and his  
 10 termination. Approximately a year passed between Naser's complaint to Vietri about the legality of  
 11 the RetireWise program and his termination. While this temporal proximity lowers the burden on  
 12 Naser in proving the causal link between his protected activity and his termination, it does not  
 13 erase it. See, e.g., Passatino v. Johnson & Johnson Consumer Prods., Inc., (9th Cir. 2000);  
 14 Wysinger v. Automobile Club of S. Cal., 157 Cal. App. 4th 413, 427 (2007). Courts are  
 15 admonished against mechanically applying such temporal proximity to supply an inference of  
 16 retaliation. Anthione v. N. Cent. Counties Consortium, 605 F.3d 740, 751 (9th Cir. 2010) (citing  
 17 Coszalter v. City of Salem, 320 F.3d 968, 977-78 (9th Cir. 2003)). Instead, Naser must "adduce  
 18 substantial additional evidence from which a trier of fact could infer the articulated reasons for the  
 19 adverse employment action were untrue or pretextual." Loggins v. Kaiser Permanente Int'l, 151  
 20 Cal. App. 4th 1102, 1113 (2007); see also Barefield v. Bd. of Trustees of Cal. State Univ.,  
 21 Bakersfield, 500 F. Supp. 2d 1244, 1272 (E.D. Cal. 2007); Yanowitz v. L'Oreal USA, Inc., 36 Cal.  
 22 4th 1028, 1046 (2005).

23 Second, Naser asserts that he can adduce such additional evidence by pointing out that  
 24 Vietri knew about Naser's complaint regarding the legality of the RetireWise program.<sup>1</sup> However,

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25 <sup>1</sup> No other evidence exists beyond the temporal proximity between Naser's expressing concern about the program and  
 26 his termination to supply the inference of retaliatory intent on the part of MetLife. Indeed, Naser's moving papers  
 27 dedicate scant space to the argument that Vietri terminated Naser on account of Naser's voiced concerns about the

1 this amounts to no more than a restatement of his argument involving temporal proximity. This is  
2 not “substantial additional evidence.” See Loggins, 151 Cal. App. 4th at 1113; Barefield, 500 F.  
3 Supp. 2d at 1272.

4 Third, Naser contends that Patel’s knowledge of Naser’s complaints about workplace  
5 discrimination on the basis of race and/or national origin and perceived religion should be imputed  
6 to Vietri because they sat on the same committee that oversaw the Ross investigation. However,  
7 Naser presents no evidence to support the assertion that his own subordinates influenced Vietri’s  
8 decision-making process. Naser asserts that Patel told him she personally thought the investigation  
9 into Naser was unfair. The Ross Report, a product of the investigatory committee on which Patel  
10 and Vietri sat, recommended enhanced supervision but not termination. It is undisputed that Vietri  
11 accepted the recommendations of the Ross Report. Naser has not presented sufficient evidence that  
12 Patel influenced Vietri’s decision to terminate, which was based on occurrences and events beyond  
13 the Ross Report.

14 Finally, Naser claims that Vietri’s conclusions about MetLife’s additional investigatory  
15 reports were wrong, and that his choice to terminate after receiving these reports constitutes  
16 evidence showing pretext. A plaintiff in Naser’s situation, however, must show more than that the  
17 employer’s decision was “wrong, mistaken, or unwise.” Morgan v. Regents of the Univ. of Cal., 88  
18 Cal. App. 4th 52, 75–76 (2000); see also Villiarimo, 281 F.3d at 1062–63 (summary judgment in  
19 favor of defendant employer appropriate where plaintiff employee could only challenge the  
20 business judgment of the employer in taking the adverse employment action).

21 For these reasons, because Naser has failed to show that there exists a genuine issue of  
22 material fact on claims 3 and 4 of the SACC, Defendant MetLife’s Motion for Summary Judgment  
23 with regard to these two claims is GRANTED.

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24 RetireWise program or the delay of his “true-up” payment. Naser has also admitted that his “true-up” was paid. See  
25 Discussion Part I.A.4, supra. Naser also appears to argue that MetLife retaliated against him by cutting his pay when it  
26 reduced his draw after the issuance of the Ross Report. To the extent that this argument forms part of his third and  
fourth causes of action, MetLife had a clear non-discriminatory reason for doing so: E-38 was overdrawn by several  
hundred thousand dollars. See Schrieffer Dep. 9/20 at 252–56.

**D. Wrongful Termination in Violation of an Implied-in-Fact Employment Contract (Claim 7)**

In claim 7 of the SACC, Naser alleges that Vietri's decision to terminate him violated an implied-in-fact employment contract requiring MetLife to follow certain termination procedures. During Vietri's July 26 deposition, Vietri stated that he believed he could not terminate Naser for simply any reason, but rather for good cause only. See Docket Item No. 75, Vietri Dep. 7/26 at 27:23–25, 28:10–12. Naser argues that this testimony binds MetLife pursuant to Federal Rule of Civil Procedure 30(b)(6), which requires a corporation to designate a representative to testify on its behalf in response to requests for discovery from opposing counsel. See Fed. R. Civ. P. 30. Naser asserts that this testimony accordingly constitutes an admission on the part of MetLife that it operated under an implied-in-fact contract to terminate Naser only for cause. Naser contends that MetLife therefore violated this contract when it terminated him without the predicate cause.

The Court rejects Naser’s argument. Under California law a company may disclaim any contract of employment by employing individuals “at will.” Guz, 24 Cal. 4th at 340–45. A company’s general at-will disclaimer is sufficient to prevent the formation of an implied-in-fact employment contract even when the company’s president testifies that he believes he can only terminate an employee for cause. Id. at 345. It would require instead a widespread understanding on the part of employees that a company that uses a general at-will disclaimer nonetheless only terminates for cause. Id.; see also Diyorio v. Am. Tel. & Telegraph Co., 242 F. App’x 450, 453 (9th Cir. 2007) (citing Guz, 24 Cal. 4th at 340–45); Dalton v. Straumann Co. USA, No. C-99-4579 VRW, 2001 WL 590038, \*8 (N.D. Cal. May 18, 2001).

Naser offers insufficient evidence to support his theory that MetLife operated under an implied-in-fact contract to terminate only for cause, especially as against the overwhelming contrary evidence MetLife has submitted. Naser offers only the testimony of Vietri during his deposition in support of this implied-in-fact contract theory. He offers no correlating testimony from fellow employees that supports his contention that MetLife only terminates for cause. By contrast, MetLife’s employee handbook materials include “at-will” notices; Naser signed “at-will”

1 acknowledgments and was repeatedly informed that all employment at MetLife was deemed “at-  
2 will.” Docket Item Nos. 74, 76, Naser Dep. 9/28 at 20–21, 25; Def.’s Ex. 23, MetLife Disciplinary  
3 Action Policy, Docket Item No. 76.; Def.’s Ex. 22, Guide to Policies and Procedures at 4.  
4 Therefore, as in Guz, finding an implied-in-fact employment contract here would “fl[y] in the face  
5 of [the company’s] general disclaimer”—its “at will” notice, of which Naser was repeatedly made  
6 aware. Guz, at 345.

7 Naser has admitted that MetLife never entered into an agreement to modify his “at-will”  
8 status and that it was his understanding that the “company had the ability or the right to terminate  
9 employees immediately if, in its judgment, it believed the offense warranted immediate  
10 termination[.]” See Naser Dep. 9/28 at 21:22–24, 24:13–16, 25:13–16, 28:6–12. This  
11 acknowledgment alone would substantiate granting summary judgment in favor of MetLife. See  
12 Pomeroy v. Wal-Mart Stores, Inc., 834 F. Supp. 2d 964, 973–977 (E.D. Cal. 2011) (granting  
13 summary judgment granted on breach of implied-in-fact employment contract theory of liability  
14 where plaintiff acknowledged at-will employment policies).

15 Accordingly, the Court GRANTS Defendant MetLife’s Motion for Summary Judgment  
16 with regard to claim 7.

17

18 **E. Claim Involving Unpaid Wages (Claim 5)**

19 With regard to claim 5 of the SACC, the Court first notes that Naser has narrowed his  
20 claims under section 201 of the California Labor Code by withdrawing those pertaining to unpaid  
21 vacation and bereavement pay. Naser Dep. 11/16 at 5:16–6:7. As such, claim 5 consists only of the  
22 allegation that MetLife failed to pay Naser \$40,000 in wages in violation of section 201. According  
23 to Naser, MetLife represented that it would credit E-38 the sum of \$40,000 in recompense for the  
24 way in which Shami’s demotion and vacation pay were handled, but never did so. Naser argues  
25 that this \$40,000 sum constitutes his wages under the Labor Code and that MetLife’s continuing  
26 failure to pay it triggers liability under sections 201 and 203. MetLife disputes that this amount

1 (and PBC per se) constitutes wages at all. MetLife notes that its employee manuals plainly state  
2 that PBC “is not manager-specific compensation.” However, Naser underscores that PBC was the  
3 sole mechanism through which he was paid. Both parties have moved for summary judgment on  
4 Naser’s unpaid wages claim.

5

6 **1. Naser’s Motion for Summary Judgment on Claim 5**

7 Naser’s first argument is that MetLife’s PBC compensation system is unlawful under  
8 section 2802 of the California Labor Code. This statute requires an employer to “indemnify his or  
9 her employee for all necessary expenditures or losses incurred by that employee in direct  
10 consequence of the discharge of his or her duties.” Cal. Labor Code § 2802(a). An employment  
11 compensation system which deducts company losses and expenses from employee base pay runs  
12 afoul of California public policy. Prachasaisoradej v. Ralph’s Grocery Co., 165 P.3d 133 (Cal.  
13 2007) (interpreting the similarly worded Cal. Labor Code §§ 221, 400–410). Specifically,  
14 employees cannot be held liable for shrink or cash shortfalls unless these losses can be personally  
15 attributed to their negligence or recklessness. See id. at 135–36, 141 (citing Hudgins v. Neiman  
16 Marcus Group, Inc., 34 Cal. App. 4th 1109, 1123 (1995)). The same is not true of bonus  
17 compensation plans, where these are based on overall profitability and used to then determine a  
18 bonus paid over and above base pay. Id.

19 Naser asserts that in order to calculate PBC, from which his base pay is exclusively drawn,  
20 MetLife must inevitably factor in business expenses and accordingly deduct them from PBC. Naser  
21 argues that this deduction violates section 2802 under the authority offered by Prachasaisoradej.  
22 The Court disagrees. Regardless of whether PBC constitutes Naser’s wages under section 201  
23 (which will be discussed below), the evidence indisputably describes the PBC compensation  
24 regime as “an override on gross premiums.” Wargacki Decl. ¶ 3. An override, as it entered the  
25 business lexicon in the 1930s, is “a commission paid to managerial personnel on sales made by  
26 subordinates.” Merriam-Webster’s Collegiate Dictionary 885 (11th ed. 2003). Similarly, a

1 commission is “a fee paid to an agent or employee for transacting a piece of business or performing  
2 as service; esp.: a percentage of the money received from a total paid to the agent responsible for  
3 the business.” Id. at 249 (emphasis in original). As such PBC merely describes a commission paid  
4 to management on the base sales (gross premiums) generated by local agency employees. The  
5 Labor Code specifically grants sanction to commission pay regimes. See Cal. Labor Code § 200.

6 What Naser draws in wages from PBC, therefore, is a discretionary percentage of a  
7 commission. In addition, MetLife’s structure for reimbursing the necessary business expenses—  
8 with which section 2802 and Prachasaisoradej are concerned—pays these expenses through a  
9 separate account. Wargacki Decl. ¶ 11. In fact, the company’s handbook admonishes managing  
10 directors against paying even supplemental expenses themselves. See Comp. Plan, Docket Item  
11 No. 81. (“The Company will directly reimburse the vendor, seller, speaker, etc. Do not pay the bill  
12 yourself and submit this for expense reimbursement.”) (emphasis in original). In short, none of the  
13 expenses that preoccupied the Prachasaisoradej court—i.e. forcing employees to pay for shrink or  
14 cash shortfalls, or other basic costs of doing business—are the kinds of expenses paid out through  
15 PBC. Prachasaisoradej, 165 P.3d at 135–36. Rather, PBC allows managing directors a  
16 discretionary fund from which they may pay themselves, other managers, and spend money to spur  
17 additional business. Wargacki Decl. ¶ 11. As such, the Court rejects Naser’s argument that the PBC  
18 compensation system is unlawful under section 2802.

19 Naser next contends that PBC constitutes wages under California Labor Code section 200  
20 and that MetLife failed to pay him wages due upon termination, in violation of section 201. Section  
21 200 defines wages as “all amounts for labor performed by employees of every description, whether  
22 the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other  
23 method of calculation.” Cal. Labor Code § 200 (emphasis added). Section 201 requires employers  
24 to immediately pay terminated employees “wages earned and unpaid at the time of discharge.” Id.  
25 § 201(a). Section 203 imposes additional liability on employers for willfully failing to pay unpaid  
26 wages in violation of section 201. Id. § 203(a).

The Court has already noted that PBC functions in the same way as commission, which is defined as wages in the Labor Code. See Cal. Labor Code § 200. In the abstract, at least, some part of PBC therefore constitutes wages under the Labor Code. The problem with Naser's theory is his claim that the entire \$40,000 allegedly directed as E-38's PBC are necessarily his wages. MetLife has offered evidence showing that a significant portion of PBC should be used to generate additional revenue and is used to pay other managerial staff. See Wargacki Decl. ¶ 23 (listing standard expected draw percentage rates and expected adjustments); Docket Item No. 83. It is left to the discretion of each managing director as to how much PBC should be used for this purpose and how much should be drawn as wages for each member of management. Id. Naser asserts that he would have paid himself the full \$40,000. Declaration of Loay Naser in Supp. of Mot. for Partial Summ. J. ("Naser Decl. Supp.") ¶¶ 16–18. However, given that the proposed sources of this PBC were investment oriented it is questionable whether any of this sum of \$40,000 was intended to be Naser's wages. The question of whether monies, which may be used either as business investment, or as personal pay at the discretion of the employee, constitute wages under sections 200 and 201 is a question of fact. See On-Line Power, Inc. v. Mazur, 149 Cal. App. 4th 1079, 1087 & n.7 (2007) (reserving as a question of fact whether payment separately made to an employee as a contracting consultant separate and apart from his payment as an employee constitutes wages under section 201).

Therefore, it remains a question of fact as to whether the \$40,000 at issue constitutes Naser's wages for which he was allegedly not paid. As such, Naser's motion for summary judgment on claim 5 is DENIED.

## **2. MetLife's Motion for Summary Judgment on Claim 5**

MetLife asserts that it should be granted summary judgment in its favor on Naser's unpaid wages claim for two reasons, each of which will be addressed in succession. First, MetLife argues that the chain of emails in which various members of MetLife's senior management reiterate a

1 commitment to credit E-38's PBC with \$40,000 is too vague as to constitute a promise to pay  
 2 wages. See Naser Decl. Supp. ¶¶ 8–10, Exs. 1-3.<sup>2</sup> MetLife underscores that the email chains does  
 3 not clearly state why a credit to E-38 is due. See Docket Item No. 94, Exs. attached to Pl.'s Mot.  
 4 for Partial Summ. J. at MET007104-MET007107 (referring to Tony Nugent's (MetLife Senior  
 5 Vice-President) understanding of Naser's "arrangement" with Rich Morosco (Naser's boss at the  
 6 time of the Shami demotion), and emphasizing his confusion over pay to some employees, and  
 7 asking about staffing and investment needs) (quotations in original). Indeed, the sourcing of these  
 8 funds was originally intended to come from a local office development fund ("SODF"), which  
 9 MetLife maintained for special projects. By contrast, at no time did MetLife offer to credit E-38's  
 10 PBC from funds specifically designed to offset incorrectly paid commissions, as it did for FSRs in  
 11 E-38 in the wake of the Ross investigation. Naser contends, however, that given his  
 12 communication with Harry Axford (his immediate superior at the time of the original  
 13 representation), who allegedly told him that Naser had effectively paid for Shami's vacation time,  
 14 MetLife understood these payments to be for Naser's wages. Therefore, there exists a question of  
 15 fact as to whether the PBC credits owed to E-38 were intended to be Naser's wages.

16 MetLife also argues that regardless of any issue of material fact as disputed between the  
 17 parties, Naser's claim is time-barred by the statute of limitations. MetLife contends that the  
 18 agreement between Naser and his supervisor to credit \$40,000 to E-38's PBC was broken in  
 19 March, 2008 when Cavanaugh emailed Naser that MetLife would not award \$40,000 in special  
 20 development fund credits to E-38's PBC. By bringing suit in December, 2011, MetLife argues, the  
 21 three-year statute of limitations forestalls Naser's unpaid wages claim. See Cal. Civ. Proc.  
 22 § 338(a); Pineda v. Bank of Am., 50 Cal. 4th 1389, 1395 (2010) (noting that a three-year statute of  
 23

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24 <sup>2</sup> Naser asserts by declaration that he and Sean Cavanaugh (a MetLife executive two levels superior to Naser's  
 25 position) had spoken at a round robin in San Francisco regarding \$40,000 that was to be credited to E-38's PBC from  
 26 the Special Office Development Fund ("SODF"). In the relevant email chain Naser submits, neither Cavanaugh nor  
 27 any other executive disavow owing money to E-38. In fact, Cavanaugh responds as follows in an email dated March  
 17, 2008: "We should talk on Friday – for the most part SODF does not exist in 2008. We will need to come at this  
 situation from a different angle..." Naser Decl. Supp. Ex. 1-3 (ellipses in original).

1 limitations governs actions pursuing unpaid wages). Naser, however, points to the original email  
2 from Cavanaugh, which reiterated MetLife's commitment to credit E-38's PBC; that email merely  
3 acknowledged that it could not come from the special development fund because the fund  
4 effectively was unavailable in 2008. Naser Decl. Supp. ¶ 12, Ex. 2 ("[F]or the most part SODF  
5 does not exist in 2008. We will need to come at this situation from a different angle."); Docket  
6 Item Nos. 93–94. Naser asserts that MetLife maintained this commitment through communications  
7 up until his termination on September 14, 2009. MetLife offers no evidence of the contrary or of  
8 communications rescinding this commitment until after Naser's termination. Naser Decl. Supp.  
9 ¶¶ 12–13, Ex. 2; see also Docket Item No. 94 (containing email communications); Docket Item No.  
10 91 (exhibiting letters between counsel for both parties in which Naser maintains his claim to  
11 \$40,000 in PBC). The Court, therefore, agrees with Naser that the three-year statute of limitations  
12 does not bar his unpaid wages claim.

13 Having found a genuine issue of material fact regarding the issue of the \$40,000 at issue,  
14 the Court DENIES MetLife's Motion for Summary Judgment with regard to claim 5.

15

16 **F. Claim Involving Failure to Reimburse (Claim 6)**

17 Section 2802 of the California Labor Code requires employers to indemnify employees for  
18 all "necessary and reasonable" business expenses incurred in the scope of their employment. Cal.  
19 Labor Code § 2802. However, "before an employer's duty to reimburse is triggered, it must either  
20 know or have reason to know that the employee has incurred an expense." Stuart v. RadioShack  
21 Corp., 641 F. Supp. 2d 901, 904 (N.D. Cal. 2009); Gattuso v. Harte-Hanks Shoppers, Inc., 42 Cal.  
22 4th 554, 568–69 (2007) ("[W]hether . . . [an] expense was 'necessary' . . . depends on the  
23 reasonableness of the employee's choices.").

24 Here, the only evidence Naser offers in support of his section 2802 claim, is that he  
25 personally paid for things such as flowers and cable television service for the E-38 office using his  
26  
27

1 personal funds.<sup>3</sup> He contends that MetLife either knew or had reason to know of his expenses  
 2 because various MetLife executives and auditors had visited E-38. In this instance, however, none  
 3 of these individuals would have “know[n] or had reason to know that [Naser] had incurred an  
 4 expense” because it was the policy of the company to pay out such expenses through PBC. See  
 5 Wargacki Decl. ¶ 8; see also Stuart, 641 F. Supp. 2d 901. This leaves Naser without evidence of  
 6 any necessary and reasonable business expenses resulting from his employment with MetLife.

7 As such, Naser has failed to meet his evidentiary burden, and the Court GRANTS  
 8 MetLife’s Motion for Summary Judgment with regard to claim 6.

#### 9           **G. UCL Claim (Claim 8)**

10 California’s Unfair Competition law (“UCL”), Cal. Bus. & Prof. Code §§ 17200 et seq.,  
 11 allows a plaintiff to “borrow” violations of other laws involving “business practices” and make  
 12 them separately actionable. Farmers Ins. Exchange v. Superior Court, 2 Cal. 4th 377, 383 (1996).  
 13 The UCL requires a plaintiff to show that the defendant participated in a business practice, that  
 14 such practice was unlawful at the time, id. (citing Barquis v. Merchants Collection Ass’n, 7 Cal. 3d  
 15 94, 113 (1972)), and that he lost money or property as a result. See Cal. Bus. & Prof. Code  
 16 § 17204. Here, the Court has determined that there remain genuine issues of disputed material fact  
 17 as to Naser’s fifth cause of action for unpaid wages. Because this alleged violation of the Labor  
 18 Code constitutes injury-in-fact and involves actual loss of money, there may therefore be an  
 19 appropriate predicate legal violation which the UCL claim may borrow. As such, the Court  
 20 DENIES Defendants’ Motion to for Summary Judgment with regard to claim 8.

#### 21           **IV. Conclusion and Order**

22 For the reasons explained above, the Court orders the following:

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 24  
 25  
 26           <sup>3</sup> Naser submits as evidence of such expenses 467 American Express credit card charges. The Court, however, has  
 27 struck these records, and they are therefore not considered here.

1           Defendant MetLife's Motion to Strike is GRANTED.

2           Defendant MetLife's Motion for Summary Judgment is GRANTED-IN-PART and  
3 DENIED-IN-PART. Defendant MetLife's Motion for Summary Judgment is GRANTED with  
4 respect to the following causes of action: discrimination on the basis of race or national origin  
5 and/or perceived religion in violation of Title VII and FEHA (claim 1); harassment on the basis of  
6 race or national origin and/or perceived religion in violation of Title VII and FEHA through the  
7 creation of a hostile work environment (claim 2); unlawful retaliation (claim 3); wrongful  
8 termination in violation of California public policy (claim 4); violation of section 2802 of the  
9 California Labor Code for failure to reimburse business expenses (claim 6); and wrongful  
10 termination (claim 7). Defendant MetLife's Motion for Summary Judgment is DENIED with  
11 respect to the following causes of action: violation of sections 201 et seq. of the California Labor  
12 Code for failure to pay wages upon termination (claim 5); and unfair competition under section  
13 17200 of the California Business and Professions Code (claim 8).

14           Plaintiff Naser's Motion for Partial Summary Judgment is DENIED.

15  
16 **IT IS SO ORDERED.**

17 Dated: July 31, 2013



18  
19 EDWARD J. DAVILA  
United States District Judge